IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Misc.No.24058-M of 2007

Date of Decision: August 20, 2007

Amanpreet Singh

...Petitioner

VERSUS

State of Punjab

...Respondent

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.S.P.S.Sidhu, Advocate,
for the petitioner.

Mr.M.C.Berry, Senior DAG, Punjab,
for the State.

*****

RANJIT SINGH, J.

Petitioner, who is accused in an FIR under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, has filed this petition seeking bail pending trial.

As per the allegations in the FIR, 400 grams of smack is shown to have been recovered from the possession of the petitioner. He has prayed for grant of bail on the ground that Chemical Examiner's report would reveal that diacetylmorphine was 8.86 per

cent in the sample of powder sent for chemical examination and if the same is calculated on this basis, the quantity recovered at the most would be 35 grams of smack and hence non-commercial. It is accordingly prayed that the petitioner would deserve to be released on bail on the ground that quantity of smack recovered from him is a non-commercial in nature. In support of his submission, the counsel has placed reliance on a case reported as ***Rakesh Kumar v. State of Haryana, 2006(1) RCR (Criminal) 9.***

Mr.Berry, on the other hand, has drawn my attention to a case of ***Yogesh Tyagi v.State, 2004(3) RCR (Criminal) 905*** to urge that in this case whole quantity recovered has to be taken into consideration to see if the same is commercial or non-commercial in nature and the chemical analysis report cannot help the case of the petitioner in the manner as is being suggested. In turn and in response, Mr.Sidhu refers to the case of ***Ansar Ahmed v. State (Govt. of NCT of Delhi, (Delhi), 2005(4) RCR (Criminal) 393,*** whereby Delhi High Court has taken a view contrary to what was expressed in ***Yogesh Tyagi's case (supra).*** Reference is also made to a decision of this court in Criminal Misc.No.16172-M of 2006, wherein similar view is taken.

In ***Yogesh Tyagi's case (supra),*** the High Court of Delhi held that weight is not to be calculated on basis of percentage of purity in the CFSL report. It was further observed that to find out whether quantity recovered is small, commercial etc., whole lot of any mixture or solution containing diacetylmorphine of whatever purity/potency will have to be taken including the foreign material used in such mixture or solution. This view was subsequently not

approved by the same High Court in the case of ***Ansar Ahmed (supra).*** While deciding this case, the High Court of Delhi duly considered the case of ***Yogesh Tyagi*** and found that this view was not in tune with the decision of the Hon'ble Supreme Court in ***Ouseph v. State of Kerala, (2004) 4 SCC 446.*** The view expressed in ***Yogesh Tyagi's case (supra),*** was found to be diametrically opposite to the view taken in the case of ***Ouseph (supra),*** in which it is held as under:-

> "The words "small quantity" have been specified by the Central Government by the notification dated 23.7.1996. Learned counsel for the State has brought to our notice that as per the said notification small quantity has been specified as 1 gram. If so, the quantity recovered from the appellant is far below the limit of small quantity specified in the notification issued by the Central Government. It is admitted that each ampoule contained only 2 ml and each ml contains only 0.3 gm. This means the total quantity found in the possession of the appellant was only 66 mg. This is less than 1/10th of the limit of small quantity specified under the notification"

In the case of ***Ansar Ahmed (supra),*** it is clearly held that to determine whether quantity is a small quantity or a commercial, the actual content of heroin is to be taken into consideration and not the entire substance. This was a case where recovery was of one kg. of brown powder. Chemical examination of the sample showed that the content of diacetylmorphine (heroin) was 2.5%. The actual weight of the content of heroin thus came to

2.5 grams which is less than small quantity (5 grams). Accordingly, the petitioner in the said case was granted bail on such consideration. It may further be noticed that while deciding ***Ansar Ahmed's case (supra),*** the High Court of Delhi has referred to and relied upon number of cases including that of ***Ouseph's case (supra).*** Reference is also made to the case of ***Masoom Ali @ Ashu v. State, 2005(3) RCR (Crl.) 280 (Delhi),*** wherein it was held as under:-

> "The reasoning given by the learned judge for dismissing the application is that the percentage in the total quantity of recovery is immaterial for the purpose of determining the offence. The reasoning does not appeal to me. I am of the view that where in a large quantity of powder recovered the percentage of the narcotic substance is very small then proportionate reduction in the recovery would have to be made in order to ascertain whether the offence falls within the categories mentioned in the NDPS Act."

This Court in the case of ***Rakesh Kumar (supra) and Criminal Misc.No.16172-M of 2006*** has also expressed identical view. In Criminal Misc.No.16172-M of 2006, reference is made to ***Ouseph and Ansar Ahmed cases (supra).*** Accordingly, it can be argued that the quantity recovered in this case would be 35 grams of smack on the basis of chemical analysis report and not 400 grams, which is the actual weight of the whole contraband recovered. Ofcourse, the trial court would go into this aspect at the time of

deciding the case on merits and this matter would require further consideration depending upon the evidence to be led before the court. For the purpose of grant of bail, this aspect may be taken into consideration and may not be taken as view on merits of the case.

Bail to the satisfaction of CJM, Nawanshahr.

Petition is allowed.

August 20, 2007 (RANJIT SINGH)
ramesh JUDGE